No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB (a corporation) and BJARNE ERIKSEN (an individual),	*Appellants,*
vs.	
CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),	*Appellee.*

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

This brief is filed pursuant to leave of court obtained at the time of the oral argument. We have endeavored to make it strictly a reply to matters advanced by counsel for the plaintiff (the appellee) in its brief.

The primary proposition which counsel advance in support of the order of the lower court is that the appointment of a receiver is a matter of discretion and the action of the lower court will not be reversed on appeal except for an abuse of discretion. No question can be made as to the correctness of the rule so stated. But neither can any question be made that the discretion

so entrusted to the chancellor is not an arbitrary but a judicial discretion—one controlled by established principles and to be exercised only in accordance with those principles and within the limits fixed by them. If this be true, as it manifestly is, then if a receiver is appointed not in accordance with the established principles governing such appointments, and in a case without the limits fixed by those principles, it is plain that there has been an abuse of the discretion entrusted to the chancellor and his order should be reversed. Our claim is that such an abuse occurred in the present case; in other words, that the order of appointment under review was made in violation of the established principles governing the appointment of receivers.

Such being our contention, two primary questions present themselves: first, what are the established principles governing the appointment of receivers? and, second, were those principles violated in the case before the court?

As to what the established principles governing the matter are, plaintiff's counsel in their brief do not take substantial issue with our statement of them. It is necessary, however, to repeat them in order that they may be in mind in discussing the question of their violation. Those principles are: that the courts are very loath to appoint a receiver *pendente lite* and a clear case for such an appointment must be made out—this because of the drastic character of the remedy as a provisional remedy; that this is particularly true as to an appointment which deprives a defendant having the legal title of the possession to which presumptively he is entitled

because of his legal title; and that a receiver will not be appointed against such a defendant unless three conditions concur. These three conditions are: (1) that there must be grave danger that unless a receiver is appointed the subject-matter of the action will be injured or destroyed, or a judgment for the plaintiff, if one finally be given, be rendered inefficacious or unenforceable; (2) that such injury or destruction will irreparably injure the plaintiff—something which can rarely be the case where the defendants are fully able to respond to any judgment against them, and (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.

In the present case the defendants admittedly have the legal title and possession. It is so alleged by the plaintiff itself (Tr. pp. 13 and 23). The three conditions last above stated must therefore appear in the present case in order to justify the appointment appealed from. Our claim is that not one of them is present.

We believe that what we have said in our opening brief as to the nonappearance or nonexistence in this case of the first two conditions mentioned is sufficient and that what is said upon this point by plaintiff's counsel does not require reply. We believe that it plainly appears that a receiver was not asked for and was not appointed in order to avoid injury to or loss of the vessel through her exposure to the perils of the sea, for the simple reason that under the management of the receiver she is exposed to those very same perils. We believe likewise that it plainly appears that a re-

ceiver was not asked for or appointed because of any danger of the court's losing jurisdiction or of its judgment being rendered inefficacious or unenforceable through the vessel being sent to sea by the defendants and thus removed without the territorial limits of the court's jurisdiction, because the court's jurisdiction is not dependent upon the presence of the vessel within this jurisdiction, and there is no allegation either that the defendants intend to remove the vessel to defeat the court's jurisdiction or evade any judgment against them, or that they are not fully able to respond to any such judgment, or have not property within this jurisdiction out of which it can be satisfied. We believe likewise that a reading of the plaintiff's petition (Tr. pp. 23-25) will make it plain that the ground upon which a receiver was asked was that the plaintiff had been in possession of the vessel up to July 15, 1921, just four days before the commencement of the action, when the plaintiff was dispossessed by the defendants, and that under these circumstances the defendants should not be permitted to have possession of and to operate the vessel during the pendency of the action. We likewise believe that it is plain that this ground did not in fact exist; that the plaintiff did not in fact have possession as alleged, and was not dispossessed by the defendants. We believe that this plainly appears because of the fact that for a month and a half prior to the 15th day of July, 1921, the plaintiff had been endeavoring to secure possession of the vessel by a libel in admiralty wherein the plaintiff averred under oath that possession was withheld from it and a recovery of possession was

sought, and because of the further fact that the captain of the vessel avers positively and without contradiction that up to the time of the institution of this libel he had never even heard of the plaintiff.

We believe likewise that it plainly appears that the plaintiff will not be irreparably injured, or for that matter injured at all, by the defendants' retaining possession of and operating the vessel, for it appears affirmatively that the defendants are not only not insolvent, but are amply able to respond to any judgment against them.

We desire by this brief to reply to certain points advanced by plaintiff's counsel in connection with the third condition which must appear in order to justify the appointment under review. That condition is, to repeat, that it must appear that there is a strong probability that the plaintiff will ultimately recover. We assume, for the purposes of this appeal, that the plaintiff's contention is correct that the vessel was originally purchased from her former Japanese owners by one C. Henry Smith for the plaintiff, or (what is the same thing), that the lower court was justified in concluding that the plaintiff would probably be able to establish that fact. But even so, our contention was and is that there is no probability of the plaintiff's ultimately recovering for three reasons, all of which, we submit, appear without contradiction in the pleadings and proofs before the court. These are: First, that the defendants were *bona fide* purchasers of the legal title for value and without notice of the trust which the

plaintiff seeks to enforce; second, that even if they were not such purchasers, but stand merely in the shoes of Smith and subject to the same equities to which he was subject, yet it appears that the vessel was purchased by Smith with his own funds, and that out of a total purchase price of $350,000 paid by him, Smith has not been reimbursed for $290,000, so that, even as against Smith, the plaintiff would not be entitled to enforce the trust under which it claims except upon the payment of this $290,000 which it has not offered to do or expressed its willingness to do; and, third, that the trust which the plaintiff seeks to enforce is illegal because created for the purpose of evading the laws of Norway, to which the title of the vessel is subject, and that its enforcement now will be in direct violation of those laws.

THE DEFENSE THAT THE PURCHASERS ARE BONA FIDE PURCHASERS OF THE LEGAL TITLE FOR VALUE AND WITHOUT NOTICE OF THE TRUST WHICH THE PLAINTIFF SEEKS TO ENFORCE.

As to the first of these reasons or defenses, there is no substantial contention by plaintiff's counsel that the defendants did not purchase the vessel, or (more accurately) take legal title to her as security, for a valuable consideration and without actual notice of the plaintiff's equity, at the time the defendants advanced the consideration and took the bill of sale for the vessel from the registered owner. Plaintiff's substantial contentions are: (1) That because the transfer of the vessel to the defendants was not actually entered upon the

registry until after the defendants had notice of the plaintiff's equity, the defendants are charged with such equity, and (2) that the defendants had constructive notice of the plaintiff's equity.

As to the first of these contentions, it might possibly be inferred from the brief of counsel that they contend that the actual conveyance of the vessel was not made until long after January 21, 1921, and at a time when it appears that the defendants had actual notice of the plaintiff's claim. The authorities which they cite are, for example, to the point that a purchaser is not protected from a prior equity if he receives notice of the equity prior to receiving the conveyance, even though he has previously and without notice paid the purchase price. We can not believe that counsel intend to claim that the actual conveyance of the vessel was made subsequent to January 21, 1921. Such a contention would be contrary to the allegations of their own complaint (see paragraph VI of the complaint, Tr. p. 13), which are to the effect that in January, 1921, the bill of sale for the vessel was endorsed and delivered by the registered owner to the defendants who subsequently had the registered ownership changed thereunder. These allegations also are in accord with all the proofs in the case and are unquestionably the facts. There is, furthermore, nothing whatever in the proofs to contradict or abut the positive averments of the defendants that when they took the bill of sale in January, 1921, they had neither actual notice or knowledge of the plaintiff's claim. As stated in our opening brief, the facts of the transaction are such as to make it well nigh

incredible that the defendants had any suspicion at that time that any one other than Smith had a beneficial interest in the vessel. The case, then, is one wherein the conveyance was executed before actual notice to the defendants, but was not entered upon the register until after such notice.

It would seem plain enough that such a purchaser is not affected by notice received at such a time. A wholly analogous case is that of one purchasing real property and taking a conveyance without notice of an equity existing against his grantor, but failing to record the conveyance until after he receives notice. The essence of such a transaction is that the purchase is complete and the title actually passes upon the execution of the conveyance, and, therefore, before notice received by the grantor. The failure to record the conveyance does not affect either the completeness of the purchase or the passage of the title, and, the purchase being complete and the title having passed before notice of the equity, the purchaser will be protected against the equity although he fails to record his conveyance until after notice received by him. The following authorities are directly to that effect.

Warnock v. Harlow, 96 Cal. 298;
Noyes v. Crawford, 118 Iowa 15; 91 N. W. 799.

In fact, even though the purchaser does not obtain the legal title, but acquires merely an irrevocable power of obtaining it in a manner which does not require action by the grantor, the purchaser will be protected although he receives notice of an equity before actually

obtaining the title. The matter is discussed by Professor Ames in

1 Harvard Law Review, at page 5.

He cites, among other authorities, in support of his position:

Dodds v. Hills, 2 H. & M. 424; 70 Eng. R. R. 528,

which fully bears him out.

The second contention of plaintiff's counsel, namely, that the defendants are charged with constructive notice that the registered owner held the title in trust for the plaintiff and not for Smith, as the defendants supposed, is based upon the fact that the defendants knew that the registered title was held upon a trust. In support of their position, counsel cite

Sternfels v. Watson, 139 Fed. 505,

wherein the purchaser of a title held by one as "trustee" who failed to inquire of the person described as "trustee" as to the actual existence of a trust was held by reason of his failure to make such inquiry to be chargeable with notice of a trust which did in fact exist. This case expressly proceeds upon the theory that the "trustee", of all persons, was the one who should best know the facts and of whom inquiry should, therefore, be made. We have no quarrel with this ruling. Manifestly it can have no application where it appears either that the trustee has already made a representation to the purchaser as to the character of the trust, or that the inquiry, if made of the trustee, would not have disclosed the equity with which it is sought to charge the purchaser. In the one case the inquiry is already an-

swered by the representation made by the trustee, and in the other case it appears that the inquiry, if made, would have been futile. In the present case no more effective representation could have been made by the registered owner to the defendants that he held the registered title in trust for Smith than his recognition of Smith as the beneficial owner, a recognition plainly made to the defendants by his taking and following the instructions of Smith to transfer the vessel to them as security for Smith's debt.

It also appears that if any inquiry had been made of the registered owner it would have disclosed merely that he knew no one but Smith in the matter and held the registered title, subject to his sole direction. This appears from the letter of Mathiesen, the registered owner, to the Bank of Italy, introduced in evidence by the plaintiff. The substance of the letter reads:

> "As you may have been able to understand, it was exclusively at the request of Mr. Smith in his telegram of the 20th April, reading: 'Inasmuch steamer Pacifico is owned California and Oriental Steamship Co., please cable direction that such is the fact that you are the representative of this company'; that on the following day I acknowledged his notification. I found it, however, at the same time expedient to make a mention of the fact that, according to his instructions, the Bill of Sale which, in due course, had been received by me had, on the 21st day of January, 1921, been deposited in original with The Norsk Hydro Elektrisk Kvaelstofaktieselskap (endorsed in blank).
>
> "Under contract of the 11th October, 1920, S/S 'Pacifico' was sold by Uchida Kisen Kabushiki Kaisha, of Kobe, to Mr. Smith, who requested me

> to be so kind as to have the vessel transferred to the Norwegian Flag with me as chartered owner. All instructions in connection with this vessel have been given me by Mr. Smith, and also all correspondence been signed by him personally, and as it moreover was he who appointed me, it is a matter of course that I had neither right, occasion nor reason to fail to conform with his instructions. On the contrary, I was bound to do so. How far Mr. Smith has gone beyond his power is unknown to me, and has nothing to do with me."
>
> (Tr. p. 77.)

The fact of the matter is that, assuming that Smith purchased the vessel for the plaintiff, the plaintiff yet permitted her registered title to be put in the name of Mathiesen, to be held by him subject solely to the control of Smith, and with Mathiesen knowing but Smith alone. In other words, the plaintiff has permitted Mathiesen and Smith between them to be clothed with all the indicia of the legal and the beneficial ownership. Under such circumstances, if Mathiesen and Smith have acted wrongfully in transferring the vessel to the defendants and either the plaintiff or the defendants must suffer because of this wrong, the loss must fall on the plaintiff, who made it possible for Mathiesen and Smith to deal with the vessel as they did, and not upon the defendants, who are in no wise responsible for the creation of the conditions which made the wrong possible.

THE DEFENSE THAT THE PLAINTIFF CANNOT RECOVER THE VESSEL WITHOUT REPAYING THE $290,000 OF THE PURCHASE PRICE WHICH SMITH ADVANCED AND FOR WHICH HE HAS NEVER BEEN REIMBURSED.

The reply of plaintiff's counsel to the defense above stated is three-fold. The first is that the fact that Smith paid $350,000 for the vessel out of his own funds and had not been reimbursed for $290,000 thereof appears only by the affidavit of Smith and that Smith is not entitled to credence. *But this reply is not open to the plaintiff.* The plaintiff's own evidence shows that it knew before the purchase that the price of the vessel was to be approximately $350,000 (see minutes of directors' meeting appearing on page 58 of Tr.). Plaintiff also certainly knew how much, if anything, it had paid on account of this purchase price. If Smith's averment that he had paid the full amount out of his own funds and had been reimbursed only to the extent of $60,000 was not true, *the plaintiff knew it.* The plaintiff nevertheless allowed the averment to go wholly uncontradicted, and having done this it cannot now claim on appeal that the averment is not true. No such claim was made in the lower court, and we relied upon the fact that the averment was not contradicted and assumed that no question was made in regard to it. We feel justified in saying that if question had been made, the truth of the averment could have been conclusively shown by evidence wholly independent of Smith. The fact is that the vessel was paid for by drafts purchased by Smith from the Bank of Italy with funds from his own personal bank account with that bank. This fact

could have been easily shown by the documents themselves and the books and letters of the bank, if any question as to the fact had been made. We might add that the failure to contradict the averment was not through an inadvertence or oversight. The facts now questioned are not only alleged in Smith's affidavit, but are set up in the defendants' answer as a separate and special defense, so that they were given a prominence and importance such that they could not be overlooked. We submit that it must be taken that Smith paid for the vessel from his own funds and has not been reimbursed in the amount of $290,000.

The second reply of the plaintiff is that any tender by it of the $290,000 would have been futile in view of the denial in the defendants' answer that the vessel was purchased by Smith for the plaintiff. But it does not follow for a moment that because the defendants deny that Smith purchased the vessel for the plaintiff they would have refused a tender of $290,000. They certainly would not have refused it if that sum were any where near the value of the vessel. So long as they receive that value, or somewhere near it, it is wholly immaterial to them, or to Smith either for that matter, whether Smith originally purchased the vessel for the plaintiff or not. It does not appear in the record just what the vessel was worth at or just prior to the commencement of the litigation. Plaintiff alleges that she is worth approximately $350,000 and the defendants deny that she is worth that sum or anything like it. The point is that if there were circumstances excusing the plaintiff from making the tender which otherwise it

should have made as a condition of its right to maintain its action, it rested upon the plaintiff to show those circumstances. One of those circumstances would certainly be that the sum of $290,000 was not so near the value of the vessel as to make the tender of that amount an inducement to accept it and avoid dispute and litigation. What the actual fact of the matter is as to the unlikelihood of the defendants' rejecting such a tender, and how probable it is that if tender had been made it would have ended all dispute and avoided this litigation, may be gathered from the fact, of which because of its common notoriety we believe the court may take judicial notice, that in the last few months and since the purchase of this vessel for $350,000 the value of shipping has fallen enormously.

A still further and, if possible, more conclusive reply to the argument that such a tender would have been futile is the fact that the plaintiff does not aver its willingness even now to pay the $290,000 which it unquestionably must pay as a condition of the relief it seeks. We have no hesitation in saying that it is not willing to pay it and will not do so. Whether the plaintiff made a tender or not, or whether, if made, such tender would have been futile, is immaterial unless the plaintiff was and is willing to pay the $290,000 which it must pay in order to recover the vessel from Smith or the defendants. Unless the plaintiff is willing to do this, it has no cause of action against the defendants, for certainly it will not be permitted to harass the defendants and occupy the time and attention of the courts with litigating what must finally lead to a futile and fruit-

less decree. So that the matter may be brought to a head, we now say formally that if the plaintiff will aver its willingness to pay $290,000 as a condition of recovering the vessel, we will consent to a decree that it do recover her upon that condition, subject only to obtaining the consent of the Norwegian government to the transfer, a consent to obtain which every effort will be made.

The third contention of the plaintiff is that the defendants held the legal title to the vessel as security only, i. e., as mortgagees, and that the record does not show that they ever contemplated possession. We do not see the materiality of this, but in any case a complete reply is that the defendants actually had possession, whether they originally contemplated having it or not, so that at the commencement of the litigation and when the receiver was appointed they occupied the position of mortgagees holding the legal title and in possession. As such mortgagees they were unquestionably entitled to retain possession. In this connection we would emphasize again the injustice of taking the possession of the vessel from the defendants by the appointment of this receiver at the instance of the plaintiff when it appears from the uncontradicted facts that the defendants are entitled to that possession of which they are deprived by the appointment and the plaintiff cannot recover the vessel, until it pays $290,000 which the plaintiff has neither offered to pay or averred its willingness to do so. What rhyme or reason was there in appointing a receiver to take possession of the vessel in order to protect the rights of the plaintiff when the

plaintiff had no right to possession except upon compliance with a condition which it had not offered to comply with, or even averred its willingness to comply with? Surely there was nothing wrongful in the defendants' possession under such circumstances, and, if there was nothing wrongful, what possible justification is there for appointing a receiver to take possession from them?

THE DEFENSE THAT THE TRUST UNDER WHICH THE PLAINTIFF CLAIMS IS ILLEGAL BECAUSE CREATED TO EVADE THE NORWEGIAN LAW, AND THAT THE RELIEF WHICH THE PLAINTIFF SEEKS WOULD BE IN VIOLATION OF THAT LAW.

The first contention of plaintiff's counsel in regard to this defense is that the matter is so complicated that its consideration was properly postponed to the time of final hearing.

An immediate reply to this is that even if the matter were complicated, the burden rested upon the plaintiff to show a clear case for the appointment of a receiver and, as an incident of this, to make it appear that it was probable that the plaintiff would ultimately recover. This the plaintiff did not do, if upon the proofs submitted the matter appeared to be so complicated that the rights of the parties could not be determined. It is novel doctrine indeed that the defendants, having the legal title and presumptively rightfully in possession, may be dispossessed by the appointment of a receiver simply because the matter is so complicated that the court cannot easily determine

what the probable ultimate rights of the parties are. If the plaintiff's right upon the pleadings and preliminary proofs is not reasonably clear, it is not entitled to a receiver.

A still further reply, however, is that the matters presented by this defense, so far from being complicated, are exceedingly simple. The fact upon which the defense is predicated is that the Norwegian statutes forbade and now forbid any vessel obtaining or having a Norwegian register unless Norwegian owned, and likewise forbid any transfer whatever of a Norwegian vessel to one who is not qualified to own such a vessel, i. e., to one not a Norwegian. The question of fact, therefore, is as to the existence of such statutes. There is certainly nothing complicated about that question, and, on its being shown that such statutes exist, the remaining questions are wholly as to the legal consequences which follow. They are pure questions of law.

Plaintiff's counsel also contend that the existence of the statutes mentioned was not shown, for the alleged reason that it was not proved that the contents of the pamphlet introduced in evidence and purporting to give the text of the Norwegian statutes did in fact give such text. The answer to this is, first, that the pamphlet purports to be printed under governmental authority so that it proves itself, so to speak, and, second, that it was admitted in evidence without objection or question, so that its authority cannot now be questioned upon appeal. On the title page, inside the cover, appears the following:

"Collection
of
Laws, Etc.
1916-1920
Relating to
The Commerce and Shipping of the
Kingdom of Norway, etc.

Published for the use of the legations and the consulates by order of the Royal Norwegian foreign office."

The rule is well established that the printed collection of laws of a foreign country purporting to be published by the authority of that country is admissible without further proof as evidence of what those laws are.

3 Wigmore, pp. 2157-2159;

Section 1900 of California Code of Civil Procedure.

If the plaintiff desired to question the authenticity or correctness of the pamphlet it was its duty to do so at the time. If it had done so we could have removed any question in the matter. We could have shown, for example, that this particular pamphlet had been obtained from the Norwegian Consulate to which it had been furnished by the Norwegian government for the Consulate's guidance.

Plaintiff's counsel also contend that neither Mathiesen, nor the plaintiff, nor Smith intended to violate the laws of Norway. But the very letters to which counsel refer (Tr. pp. 59, 63-65) show that it was intended from the start to obtain a Norwegian register for the vessel and that she was registered in the name of Mathiesen for the sole reason that her true ownership

could not be shown and a Norwegian register obtained. A clearer instance of an attempt to evade the substantial requirements of a statute by an apparent compliance with them on the face of the record can hardly be imagined.

It would seem to follow beyond reasonable question that the unregistered trust by means of which such evasion was attempted was illegal. To our citation of authorities to that effect, counsel reply by quoting from *Lewin on Trusts,* to the effect that since the rendition of English cases cited by us the English law has been changed. This is true, but the change was not one in the law of trusts, but in the statute itself whereby that which had formerly been forbidden was no longer forbidden and the illegality was therefore removed. We submit that it is clear enough that if the trusts which were involved in the later English cases had been trusts created for the purpose of evading English statutes they would unquestionably have been held illegal.

Counsel would also seem to make the point that because the vessel happened to be here when the litigation was commenced the rights of the parties are not governed or affected by the Norwegian law and that this court should decree a transfer of the title to the vessel as the plaintiff asks, even though such transfer would be in violation of the Norwegian law. But it would seem to be wholly immaterial where the vessel happened to be when the litigation was commenced. The question is as to what law governs the rights of

the parties, and certainly that law does not vary as the vessel proceeds from port to port. We are not dealing here with the *res,* the vessel herself, but with the title to her, and since she is a Norwegian vessel it must be that questions as to her title and as to the transfer of her title are to be governed and determined by the Norwegian law.

There is a marked difference between such a case as the present and one involving rights arising not under the Norwegian law but under the law of the place where the vessel happens to be at the time. If, for example, supplies are furnished a vessel in some port where she happens to be, the right of the one supplying them depends upon and is governed by the law of that port and if by that law a lien is given for the value of the supplies the lien will exist and be enforced regardless of the law of the vessel's home port. But where, as here, the parties undertake to deal with the title of the vessel, their rights are governed by the law to which her title is subject. That law is the law of her home country and, in the present case, is the Norwegian law.

Dated, San Francisco,
November 1, 1921.

Respectfully submitted,

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